

SERVICE DATE - JUNE 15, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42142

CONSUMERS ENERGY COMPANY

v.

CSX TRANSPORTATION, INC.

Digest:<sup>1</sup> The Board denies a motion to dismiss Consumer Energy Company's revenue adequacy claim.

Decided: June 11, 2015

On January 13, 2015, Consumers Energy Company (Consumers) filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT) for unit train coal transportation service in shipper-supplied rail cars to Consumers' generating station near West Olive, Mich., from CSXT's established railroad interchange with BNSF Railway Company in the vicinity of Chicago, Ill. Consumers alleges that CSXT possesses market dominance over the traffic and that CSXT's rates are unreasonable under both the stand-alone cost constraint and the revenue adequacy constraint. CSXT filed its answer to the complaint on February 2, 2015. The Board entered a protective order in this proceeding on March 18, 2015.

On March 24, 2015, CSXT filed a motion to dismiss the revenue adequacy claim in Consumers' complaint. CSXT argues that the claim should be dismissed because: (1) Consumers has provided no reasonable grounds to investigate the claim; (2) dismissal would simplify the dispute; and (3) the Board is considering revenue adequacy issues in Railroad Revenue Adequacy, Docket No. EP 722. Consumers objects to CSXT's motion, arguing that CSXT's has not met the high threshold necessary for the Board to dismiss a claim.

The Board may dismiss a complaint if it "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored. In reviewing a motion to dismiss, all alleged facts are viewed in the light most favorable to the complainant. Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011).

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

CSXT argues that there are no reasonable grounds to investigate the claim, and points to the Board's annual revenue adequacy determinations, under which CSXT has been found revenue inadequate for 28 years. These determinations suggest that CSXT is revenue inadequate, and the agency may consider these findings in individual rate proceedings, consistent with its precedent. R.R. Revenue Adequacy—1987 Determination, 4 I.C.C. 2d 731, 734 (1988). However, agency precedent also states that the annual determinations are not necessarily conclusive evidence of a railroad's financial condition in rate reasonableness proceedings. Id.; see also Bituminous Coal—Hiawatha, Utah, to Moapa, Nev., 6 I.C.C. 2d 1, 7 n.24 (1989). The Board's predecessor agency, the Interstate Commerce Commission, has stated that "any other competent and probative evidence relative to the carrier's revenue adequacy may be submitted in individual rate reasonableness proceedings." Bituminous Coal, 6 I.C.C. 2d at 7 n.24. Thus, although the annual determinations suggest that CSXT is revenue inadequate, Consumers has stated a claim under the constraint and may present other competent and probative evidence to make its case, should it so choose.

We find CSXT's other grounds for dismissal to be unpersuasive. Although dismissal of this claim might simplify the dispute, as CSXT alleges, that is not, standing alone, a compelling reason to preclude Consumers from advancing its claim. Similarly, CSXT has not presented compelling arguments as to why the agency's exploration of revenue adequacy issues in Docket No. EP 722 should prevent Consumers from advancing a claim under the revenue adequacy constraint, which has been a part of the agency's maximum rate guidelines, Constrained Market Pricing, for the past three decades. See Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 534-37 (1985). Indeed, the revenue adequacy constraint has been considered by the agency in proceedings completed prior to the initiation of Docket No. EP 722. See, e.g., Bituminous Coal, 6 I.C.C. 2d at 6-9; see also CF Indus., Inc. v. Koch Pipeline Co., 4 S.T.B. 637, 656-62 (2000) (applying the revenue adequacy constraint in a pipeline context).

For these reasons, CSXT's motion to dismiss will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CSXT's motion to dismiss Consumers' revenue adequacy claim is denied.
2. This decision is effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.